

Decision of the European Ombudsman on complaint 3001/2005/MF against the European Commission

Decision

Case 3001/2005/MF - Opened on 22/09/2005 - Decision on 10/12/2007

Strasbourg, 10 December 2007

Dear Mr P.,

On 5 August 2005, you submitted a complaint to the European Ombudsman against the European Commission concerning the conditions of your retirement, namely, the transfer of your pension rights (1) .

On 22 September 2005, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 30 November 2006.

On 9 December 2005, I forwarded it to you with an invitation to make observations, which you sent on 20 January 2006.

On 29 June 2006, you sent me a further letter related to your complaint.

On the occasion of a telephone conversation with my services on 18 June 2007, you informed them that you were about to bring an action against the Commission before the European Union Civil Service Tribunal concerning the issue raised in your complaint.

In light of the above, by letter of 25 October 2007, I invited you to submit your observations, by 15 November 2007, on the possible implication of Article 2(7) of the Ombudsman's Statute to your complaint.

On 29 October 2007, you telephoned my services and referred to the 10 October 2007 Order of the European Union Civil Service Tribunal concerning your of 23 February 2007 application to the latter against the European Court of Auditors (2) .

By letter of 7 November 2007, you sent me your comments.

I am writing now to let you know the results of the inquiries that have been made.



THE COMPLAINT

According to the complainant, the relevant facts were, in summary, as follows:

The complainant is a retired official of the European Court of Auditors ("ECA"). Before working at the ECA, he had worked in the banking sector in France, from 1974 to 1982.

On 10 November 1994, the complainant asked the ECA to transfer to the Community pension scheme his pension rights deriving from his period of employment in the banking sector in France.

On 13 November 1996, the ECA replied that it was not possible to transfer pension rights acquired in the banking sector. It further replied that it was for the European Commission to establish a regulation with the Association of Supplementary Pension Schemes ("ARRCO" (3)) in order to make it possible to transfer the whole of the pension rights acquired in France.

On 25 August 2004, the complainant sent a letter to the Commission in which he submitted that the European Commission had failed to take any measures to ensure that the French authorities respect the provisions of the Staff Regulations (4) relating to the transfer of pension rights.

In its reply of 27 October 2004, the Commission informed the complainant that the new Staff Regulations had rendered null and void the agreement signed between itself and France in 1992 ("the 1992 agreement") relating to the transfer of pension rights from French pension funds to the Community pension scheme. The Commission pointed out that the 1992 agreement had not covered all relevant transfers of pension rights and had not been respected by France. As a result of these deficiencies, the Commission had decided not to conclude a new agreement with the French Government but only to set out simple technical arrangements.

The Commission further stated that French authorities had informed it that they envisaged drawing up an inter-ministerial circular. The Commission expressed the view that the complainant's file was likely to be closed in the near future.

In his complaint to the European Ombudsman, the complainant alleged that the Commission had failed to ensure that the French authorities respect the provisions of the Staff Regulations relating to the transfer of his pension rights.

THE INQUIRY

The opinion of the Commission

The Commission's opinion on the complaint was, in summary, as follows:

On 10 November 1994, the complainant, an official of the ECA, requested the transfer of his pension rights acquired in France to the Community pension scheme, pursuant to Article 11(2) of Annex VIII of the Staff Regulations (5) . At the date of the Commission's opinion, not all of the



complainant's pensionable rights acquired in the banking sector had yet been transferred.

According to the provisions of the Staff Regulations in force at the time of the complainant's request for the transfer of his pension rights (6) , the complainant had the possibility of having either the actuarial equivalent or the flat-rate redemption value ("*forfait de rachat* ") of his retirement pension rights paid to the Communities.

The Commission pointed out that the choice of the calculation method of the transferable amount was the exclusive competence of the national authorities (7) . In its view, the French pension schemes which were signatories of the 1992 agreement had chosen the transfer of the flat-rate redemption value of his retirement pension rights, that is, the amount corresponding to the contributions actually paid by the complainant. The Commission also noted that the banking sector had been incorporated into ARRCO on 1 January 1994 and that, prior to this date, no contributions had been paid by the banking sector to ARRCO. This was the reason why ARRCO refused to take into account the pension rights acquired for the period of employment prior to 1 January 1994.

The new Staff Regulations, which entered into force on 1 May 2004, and, in particular, the new wording of Article 11(2) of Annex VIII of the Staff Regulations (8) which foresees the transfer of the capital value of pension rights, facilitated the re-launch of negotiations with those schemes that were still not agreeing to the transfer, whether completely or partially. In the Commission's view, since the entry into force of the new Staff Regulations, there has been progress concerning these transfers. With regard to such progress, the Commission gave the example of the French Bar Association (9) which was eventually convinced to transfer and release the relevant pension files. Currently, sectors such as the agricultural sector, as well as self-employed persons, were re-examining their position.

Furthermore, the Commission had convinced the French Ministry of Social Affairs to draft a new text regarding the implementation of Article 11 (10) of the Staff Regulations. The new implementing measure requires all the pension funds of employees and of workers who are not wage earners to transfer the "capital" representing the pension rights of their affiliated members. In the Commission's view, the files of the affiliated members of ARRCO pertaining to the banking sector would also be resolved in a positive manner. According to the most recent information provided by ARRCO, the revision of the calculation of the transferable amount was under way.

The Commission stated that it never ignored the problem raised by the refusal of the supplementary pension associations to transfer the rights pertaining to the banking sector. The Commission welcomed the fact that the reform of the Staff Regulations, and more particularly the revision of Article 11 of its Annex VIII, enabled it to achieve substantial progress in the field of the transfer of pension rights.

The complainant's observations

In his observations, the complainant stated that, since the date of his complaint to the Ombudsman, he had received new proposals from ARRCO and from the General Association of Pension Institutions for Managerial Staff ("AGIRC") (11) as regards the transfer of his pension



rights.

The complainant further received an e-mail from the group " *Malakoff* " (12) in which he was informed of how his pension rights had been calculated. The complainant stated that he had also received two proposals from the ECA as regards the amount to be transferred to the Community pension scheme (13) . The complainant contested the amounts specified in these proposals because they were not based on the amounts of the contributions paid.

In the complainant's view, the Commission did not make any comment on the approaches to be taken to ensure that French authorities comply with the Staff Regulations as regards the transfer of his pension rights. The complainant stated that the file on to his pension rights was still pending and, as a consequence, when he took early retirement, as of 1 January 2006, he was not granted all the pension rights to which he was entitled.

The complainant's further letter of 29 June 2006

In his further letter of 29 June 2006, the complainant informed the Ombudsman that, by letter of 27 March 2006, he asked the Commission whether it considered that the amounts proposed to it by ARRCO and AGIRC on 7 October 2005 and 14 November 2005 respectively, had been calculated in accordance with Community law.

The complainant enclosed with his letter the reply of 18 May 2006 which the Vice-President of the Commission had sent to him. In this letter, the Vice-President replied to the complainant that the conditions for the calculation of the amounts to be transferred by ARRCO and AGIRC were in conformity with the new Staff Regulations.

The Vice-President further referred to Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertotilli and others v Commission* (14) with respect to the determination of the actuarial equivalent of pensionable service to be credited by virtue of Article 11(2) of Annex VIII. In this regard, the Court had declared that the national pension scheme to which the official was affiliated prior to entering the service of the Communities had exclusive competence to determine the relevant actuarial equivalent. The Vice-President stated that, pursuant to this judgment, the Commission had no competence to challenge the method of updating this amount chosen by ARRCO and AGIRC.

In the complainant's view, the Commission had breached its duty to provide assistance because it had never informed him of Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertotilli and others v Commission* or of the necessity to refer to the national courts in order to settle the issue related to the transfer of his pension rights by CRSG (15) , that is, the retirement fund of the bank for which he had worked.

The complainant further stated that the Commission had infringed the principle of equal treatment and non-discrimination by allowing retired French civil servants to transfer the whole of their pension rights to the Community, while denying this right to retired Community officials who had previously worked in the banking sector.

The subsequent developments *Telephone conversation between the complainant and the Ombudsman's services*



On the occasion of a telephone conversation on 18 June 2007, the complainant informed the Ombudsman's services that he was about to bring an action against the Commission before the European Union Civil Service Tribunal concerning the issue raised in his complaint.

The Ombudsman's letter of 25 October 2007

In light of the above, by letter of 25 October 2007, the Ombudsman invited the complainant to submit his observations on the possible implication of Article 2(7) of the Ombudsman's Statute to his complaint.

The telephone conversation between the complainant and the Ombudsman's services

On 29 October 2007, the complainant telephoned the Ombudsman's services and referred to the 10 October 2007 Order of the Civil Service Tribunal in case F-17/07 by which the Tribunal dismissed his application (16) .

The complainant's reply of 7 November 2007

By letter of 7 November 2007, the complainant sent the Ombudsman his comments.

He stated that, pursuant to the 10 October 2007 Order of the Civil Service Tribunal in case F-17/07, the Tribunal did not examine the substance of his application of 23 February 2007 against the ECA and the letter of Vice-President of the Commission of 18 May 2006, on the grounds that he had not used the internal remedies foreseen by Article 90 of the Staff Regulations.

Therefore, in the complainant's view, Article 195 of the EC Treaty did not apply to his complaint.

THE DECISION

1 The Commission's alleged failure to ensure that the French authorities respect the provisions of the Staff Regulations related to the transfer of the complainant's pension rights

1.1 The complainant is a retired official of the European Court of Auditors ("ECA"). Before working at the ECA, he worked in the banking sector in France, from 1974 to 1982. On 10 November 1994, the complainant asked the ECA to transfer to the Community pension scheme his pension rights deriving from his period of employment in the banking sector in France. On 13 November 1996, the ECA replied that it was for the European Commission to establish a regulation with the Association of Supplementary Pension Schemes ("ARRCO") in order to make it possible to transfer the whole of the pension rights acquired in France. It went on to state that, in this context, it was not possible for the European Court of Auditors to transfer the pension rights acquired in the banking sector. On 25 August 2004, the complainant sent a letter to the Commission in which he submitted that the latter had failed to take any measures to ensure that the French authorities respect provisions of Staff Regulations related to the transfer of pension rights. In his complaint to the Ombudsman, the complainant alleged that the Commission had failed to ensure that the French authorities respect the provisions of the Staff Regulations related to the transfer of his pension rights.

1.2 In its opinion, the Commission stated that, according to the provisions of the Staff Regulations in force at the date of the complainant's request for the transfer of his pension rights (17) , the latter had the possibility of having either the actuarial equivalent or the flat-rate



redemption value ("*forfait de rachat*") of his retirement pension rights paid to the Communities. The Commission pointed out that the choice of the calculation method of the transferable amount was the exclusive competence of the national authorities. The French pension schemes which were signatories of the agreement of 1992 ("the 1992 agreement") had chosen the transfer of the flat-rate redemption value of his retirement pension rights, that is, of the amount corresponding to the contributions actually paid by the complainant. The Commission also noted that the banking sector had been incorporated into ARRCO on 1 January 1994 and that, prior to this date, no contributions had been paid by the banking sector to ARRCO. This was the reason why ARRCO refused to take into account the pension rights acquired for the period of employment prior to 1 January 1994. Furthermore, the Commission had convinced the French Ministry of Social Affairs to draft a new text regarding the implementation of Article 11 of the Staff Regulations (18). The new implementing measure requires all the pension funds of employees and of workers who are not wage earners to transfer the "capital" representing the pension rights of their affiliated members. In the Commission's view, the cases of the affiliated members of ARRCO pertaining to the banking sector should also be resolved in a positive manner. According to the most recent information provided by ARRCO, the revision of the calculation of the transferable amount was under way. The Commission stated that it never ignored the problem raised by the refusal of the supplementary pension associations to transfer the rights pertaining to the banking sector.

1.3 In his observations, the complainant stated that, since the date of his complaint, he had received new proposals from ARRCO and from the General Association of Pension Institutions for Managerial Staff ("AGIRC" (19)) as regards the transfer of his pension rights. In the complainant's view, his file relating to his pension rights was still pending and, as a consequence, he had to go on early retirement, as from 1 January 2006, without being granted all the pension rights to which he was entitled.

1.4 On the occasion of a telephone conversation on 18 June 2007, the complainant informed the Ombudsman's services that he was about to bring an action against the Commission before the European Union Civil Service Tribunal concerning the issue raised in his complaint.

1.5 In light of the above, by letter of 25 October 2007, the Ombudsman invited the complainant to submit his observations on the possible implication of Article 2(7) of the Ombudsman's Statute to his complaint. On 29 October 2007, the complainant telephoned the Ombudsman's services and referred to the 10 October 2007 Order of the European Union Civil Service Tribunal, in case F-17/07 by which the Tribunal dismissed his application.

1.6 In his reply of 7 November 2007, the complainant stated that, pursuant to the said Order of 10 October 2007 in case F-17/07, the Civil Service Tribunal did not examine the substance of his application of 23 February 2007 against the ECA and the letter of Vice-President of the Commission of 18 May 2006, on the grounds that he had not used the internal remedies foreseen by Article 90 of the Staff Regulations. Therefore, his complaint to the Ombudsman should still be admissible.

1.7 The Ombudsman notes that, pursuant to Order of the Civil Service Tribunal (20) in case



F-17/07, the complainant's action to annul the Court of Auditors' decision of 23 November 2006 and the Commission's decision of 18 May 2006 was dismissed as manifestly inadmissible.

In this context, the Ombudsman finds it useful to refer to the relevant parts of the order of the Civil Service Tribunal, namely paragraphs 41 to 47, and in particular paragraphs 42 and 43, which read as follows:

“ 42 In order to contest the content of the letter of the Vice-President of the Commission of 18 May 2006, which he claims was prejudicial to him, the applicant turned to the Court of Auditors, and not to the Commission. However, while the Court of Auditors, in its capacity of appointing authority, was competent to decide whether the complaint was well-founded insofar as the complaint concerned the legality of its acts or the consequences of its actions, it had no power to decide on the legality of an act adopted by the Commission (...).

43 The application, insofar as it is directed against the letter of the Vice-President of the Commission of 18 May 2006, was not therefore preceded by a preliminary complaint, calling on the author of the act to take a position as regards the arguments put forward against that act. However, this condition, to which Article 91(3) of the Staff Regulations subordinates the admissibility of an application, is required by the aforementioned Staff Regulations, in particular in order to allow and encourage an amicable settlement of the disagreement between the official and the administration (...). ” (21) .

1.8 The Ombudsman recalls that, pursuant to Article 1(3) of his Statute:

"[t]he Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling. "

The Ombudsman also notes that the Tribunal based its decision on the grounds that the complainant has not exhausted the internal remedies foreseen by the Staff Regulations against the letter of the Vice-President of the Commission of 18 May 2006.

Moreover the Ombudsman also recalls that Article 2.8 of his Statute states that:

" [n]o complaint may be made to the Ombudsman that concerns work relationships between the Community institutions and bodies and their officials and other servants unless all possibilities for submission of internal administrative requests and complaints, in particular the procedures referred to in Article 90 (1) and (2) of the Staff Regulations, have been exhausted by the person concerned (...). "

1.9 In light of the above, to the extent that the Civil Service Tribunal decided that the complainant's application was to be declared as inadmissible on the grounds that the complainant had failed to use the internal remedies foreseen by the Staff Regulations, the Ombudsman is, on the basis of Article 2.8 of his Statute, obliged to file his inquiry on the present complaint without any further action.

2 Conclusion



Having regard to the Order of the Civil Service Tribunal (First Chamber) of 10 October 2007, and to Articles 1(3) and 2(8) of his Statute, the Ombudsman terminates his consideration of the complaint and files the case without further action.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) In his letter to the Ombudsman, the complainant made allegations against both the Commission and the European Court of Auditors. Given that these allegations concerned two separate Community institutions and bodies, the Ombudsman registered the complainant's letter as a complaint against the Court of Auditors (complaint 2674/2005/MF) and as a complaint against the Commission (complaint 3001/2005/MF).

(2) In view of the complainant's application "F-17/07 *Pouzol v Court of Auditors*" brought on 23 February 2007 to the Civil Service Tribunal, the Ombudsman informed the complainant, by decision of 11 June 2007, that he has decided to close his inquiry in case 2674/2005/MF against the Court of Auditors on the basis of Article 2(7) of his Statute.

(3) This acronym stands for "*Association des régimes de retraites complémentaires*".

(4) Reference is made here to the Staff Regulations in force up to 30 April 2004.

(5) See footnote 4.

(6) See footnote 4.

(7) See Case 315/85 *Commission v Luxembourg* [1987] ECR 5391; and Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertottilli and others v Commission* [1989] ECR 3599.

(8) Article 11(2) provides as follows: "*[a]n official who enters the service of the Communities after:*

– leaving the service of a government administration or of a national or international organisation; or

– pursuing an activity in an employed or self-employed capacity;

shall be entitled (...) to have paid to the Communities the capital value (...) of pension rights acquired by virtue of such service or activities. (...)."



- (9) " *Conseil National des Barreaux* " in French.
- (10) The Ombudsman understands the Commission to refer to Article 11 of Annex VIII of the Staff Regulations.
- (11) This acronym stands for " *Association générale des institutions de retraite des cadres* ".
- (12) The complainant informed the Ombudsman that the group " *Malakoff* " belongs to the pension funds ARRCO and AGIRC.
- (13) The complainant stated that, on 7 December 2005, he had submitted an Article 90(2) complaint to the ECA concerning these two proposals and attached this Article 90(2) complaint to his observations.
- (14) Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertottilli and others v Commission* [1989] ECR 3599.
- (15) This acronym stands for " *Caisse de retraite de la Société Générale* ".
- (16) See footnote 2.
- (17) Reference is made here to the Staff Regulations in force until 30 April 2004.
- (18) The Ombudsman understands the Commission to refer to Article 11 of Annex VIII of the Staff Regulations.
- (19) This acronyme stands for " *Association générale des institutions de retraite des cadres* ".
- (20) Order of the Civil Service Tribunal (First Chamber) of 10 October 2007 - Pouzol v Court of Auditors Case F-17/07.
- (21) Translation by the Ombudsman's services from the original French version:
- « 42 Pour contester le contenu de la lettre du vice-président de la Commission du 18 mai 2006, dont il soutient qu'elle lui fait grief, le requérant s'est en effet tourné vers la Cour des comptes, et non vers la Commission. Or, si la Cour des comptes, en qualité d'AIPN, avait compétence pour statuer sur le bien-fondé de la réclamation en tant que cette dernière visait la légalité de ses actes ou les conséquences dommageables de ses agissements, elle n'avait aucun titre à se prononcer sur la légalité d'un acte adopté par la Commission (...).
- 43 Le recours, en tant qu'il est dirigé contre la lettre du vice-président de la Commission du 18 mai 2006, n'a donc pas été précédé d'une réclamation préalable, invitant l'auteur de cet acte à se prononcer sur les griefs formés à l'encontre dudit acte. Or, cette exigence, à laquelle l'article 91, paragraphe 3, du statut subordonne la recevabilité d'un recours, est requise par ledit statut notamment afin de permettre et favoriser un règlement amiable du différend entre le



fonctionnaire et l'administration »